FILE COPY

OCT 13
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

NO. 67

RICHWOOD CLOTHESPIN & DISH WORKERS UNION,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

UPON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON BEHALF OF RICHWOOD CLOTHESPIN & DISH WORKERS UNION

C. S. RHYNE
730 Jackson Place, N. W.
Washington, D. C.

M. E. BOIARSKY
Charleston, West Virginia.

Counsel for Richwood Clothespin & Dish Workers Union

SHAFER PRINTING COMPANY, CHARLESTON, WEST VIRGINIA

INDEX

	PAGE
Jurisdiction	1
Opinions Below	3
Statement of the Case	3
1. Proceedings Before the Board	3
2. Decision of the Circuit Court of Appeals For the Fourth Circuit	6
3. Statement of Facts	7
(1) Relating to Contract of March 7, 1942	7
(2) Relating to Issue of Employer's Sponsorship, Domination of, and Aid to, Independent	12
Assignment of Errors	14
Argument:	15
I. There is no factual or legal basis for the Court's conclusion that the discharge of employees was discriminatory and constituted an unfair labor practice within the meaning of the Act	15
II. The Circuit Court erred in holding that the Board was justified in considering alleged unfair labor practices which antedated the election agreement and the election	23
III. The Circuit Court of Appeals erred in sustaining the Board's findings that the employer dominated and interfered with the formation and administration of the Independent and has contributed support to it	27
Conclusion	38

TABLE OF CITATIONS

PAGE

Chambers Corporation and Allied and Stove Mounters and Stove Processors, 6 L. R. R. Man. 132 25

Consolidated Edison v. N. L. R. B., 305 U. S. 197, 83 L. ed. 126 20

Cupple's Co. Mfgrs. v. Board, 106 F. (2d) 100 (C. C. A., 8) 30

Greenwood v. Building Trades Council, 71 Cal. App. 159, 233 P. 823 18

Hazel-Atlas Glass Co. v. N. L. R. B., 127 F. (2d) 109 (C. C. A. 4) 26

International Assn. of Machinists v. N. L. R. B. 61 S. Ct. 83, 89, 311 U. S. 72 35

Magnolia Petroleum Co. v. N. L. R. B., 112 F. (2d) 545 (C. C. A. 5) 35

Matter of Cherry River Boom & Lumber Co., 44 N. L. R. B. 273 36

Matter of Hope Webbing Co., 14 N. L. R. B. 55 25

Matter of Wickwire Bros., 16 N. L. R. B. 316 25

Matter of Simplicity Pattern Co., Inc., etc., 16 N. L. R. B. 291 21

Matter of M. Henri Wines, Ltd., 44 N. L. R. B. 1310 22-23

Matter of Rutland Court Owners, Inc., 44 N. L. R. B. 587 23

Mayer v. Journeymen Stonecutters' Assn., 47 N. J. Eq. 519, 20 Atl. 492 18

Miller v. Reuhl, 2 N. Y. S. (2) 391 18-19-20-22

Murphy v. Higgins, 12 N. Y. S. (2) 913 18

N. L. R. B. v. Appalachian Electric Power Co., 140 F. (2) 217 26

TABLE OF CITATIONS (Continued)

	PAGE
N. L. R. B. v. Electric Vacuum Cleaner Co., Inc., 315 U. S. 685, 62 S. Ct. 846	21-22
N. L. R. B. v. Poultrymen's Service Corp., 138 F. (2) 201 (1943)	31
N. L. R. B. v. Sun Shipping & Drydock Co., 135 F. (2) 15 (CCA 3)	27
N. L. R. B. v. Swank Products, 108 F. (2) 872 (CCA 3)	35
Polish Nat. Alliance, etc. v. N. L. R. B., 136 F. (2) 175, 181 (CCA 7)	32
Richwood Clothespin & Dish Workers Union v. N. L. R. B., 141 F. (2) 87 (CCA 4)	6
Shein v. Rose, 12 N. Y. S. (2) 87	19
Simpson v. Grand Inter. Bro. of Locomotive Engrs., 88 W. Va. 355, 98 S. E. 530	18

STATUTES

49 Stat. 452; USCA.; Tit. 29, sec. 157 158, p160	17 Appendix
Laws of Kansas, 1941, Ch. 265	20
Laws of Wisconsin, 1939, Ch. 57	20
Pa. Stat. Ann. (Purdon, Supp., 1939) Tit. 43	20

TEXTS AND MISCELLANEOUS SOURCES

1 Teller, Labor Disputes and Collective Bargaining, 287	18
How Collective Bargaining Works	21
Eighth Annual Report, NLRB, 52	27
Congressional Record	18

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

NO. 67

RICHWOOD CLOTHESPIN & DISH WORKERS UNION,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

UPON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON BEHALF OF RICHWOOD CLOTHESPIN & DISH WORKERS UNION

JURISDICTION

Upon complaint (R. 31) issued by National Labor Relations Board (hereinafter called "Board") on June 25, 1942, that the Wallace Corporation (hereinafter called "employer" or "company") and B. E. Thompson[1] had engaged in unfair

[1] The complaint as to Thompson was dismissed. (R. 28).

labor practices in violation of Section 8 (1), (2) and (3) and Section 2 (6) and (7) of National Labor Relations Act, following charges filed by Local Union No. 129, United Construction Workers Organizing Committee (hereinafter called either "Union" or "CIO." The Board, after hearing and argument, issued its decision and order (R. 1) wherein it found that employer had dominated and interfered with the formation and administration of, and contributed support to, Richwood Clothespin & Dishworkers Union (hereinafter called "Independent"), which had intervened in the hearing of the complaint charges, and that a contract between it and the employer dated March 7, 1942, "falls outside the proviso to Section 8 (3) of the Act," and, among other matters, ordered reinstatement by the employer of forty-three employees to their former or substantially equivalent positions, and also ordered the disestablishment of Independent as a representative of any of the employees of employer for designated collective bargaining purposes.

Upon petition for review filed in the United States Circuit Court of Appeals, Fourth Circuit, that Court entered a decision and decree on February 3, 1944, enforcing the order issued by the Board and ordering that Independent abide by and perform the Board's directions contained in the order. A rehearing of the cause (R. 372, 374), timely filed, was denied on March 13, 1944.

Jurisdiction of this Court was invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Sections 10 (e) and (f) of the National Labor Relations Act. [29 U.S.C.A. 160 (e) and (f).]

OPINIONS BELOW

The decision and order of the Board is reported in 50 NLRB 138. The opinion of the Circuit Court of Appeals is reported in 141 F. (2d) 87.

STATEMENT OF THE CASE

1. PROCEEDINGS BEFORE THE BOARD

A. THE PLEADINGS[2]

As heretofore noted, the Board issued its complaint charging, in substance, that employer had interfered with and discouraged its employees in its plant situate at Richwood, West Virginia, with respect to membership and activities in the Union and that employer had sponsored the formation of, and dominated Richwood Clothespin & Dish Workers' Union and encouraged membership therein and had contributed to its support; and that on or about March 18, 1942, employer, purporting to act pursuant to an alleged agreement between itself and the Independent discharged and thereafter refused to reinstate forty-three named employees because of membership in Union and because of their non-membership in the Independent; and that said contract of March 7, 1942, was illegal and void since it was made with a labor organization assisted by unfair labor practices and not the representative of the employees pursuant to Section 9 (a) of the act.

[2] These pleadings appear in the record on pages as follows: Complaint, R. p. 31, 38; Independent's Answer, R. p. 313; Board's Decision and Order, R. p. 1.

Independent's petition to intervene was granted in so far as its interests were affected by the proceeding. Independent, employer and said Thompson filed separate answers to the complaint in each of which the charges were denied, and likewise each moved to dismiss the proceeding. (R. 285).

Independent's answer (R. 313) alleged, in part, the following:

"That the said Local Union No. 129, United Construction Workers, Organizing Committee heretofore filed another unfair labor practice charge against the said Wallace Corporation, but that said charge was later withdrawn and a consent election held under the direction of the National Labor Relations Board for the purpose of enabling the nonsupervisory employees of The Wallace Corporation at Richwood, West Virginia, to determine by secret ballot their exclusive collective bargaining agency, if any they desired; that pursuant to agreement between The Wallace Corporation, the employer, Local Union No. 129, United Construction Workers Division of District 50, United Mine Workers of America, and the Richwood Clothespin and Dish Workers Union, a Corporation, an independent employees' union composed of nonsupervisory employees of The Wallace Corporation, of Richwood, West Virginia, with the consent and approval of Philip G. Phillips, Regional Director for the National Labor Relations Board, Ninth Region, the said Richwood Clothespin and Dish Workers Union aforesaid was thereby recognized as a labor union within the meaning of the National Labor Relations Act and placed upon the ballot to be used at said consent election, together with that of the Local Union No. 129 aforesaids; that at the election so held the said employees chose as their exclusive collective bargaining agency the said Richwood Clothespin and Dish Workers Union; that the re-

sult of said election was properly certified to the National Labor Relations Board as provided by law, and such organization was thereafter officially declared and recognized as the exclusive bargaining agency of the employees aforesaid; and acting under authority conferred by the National Labor Relations Act, said Richwood Clothespin and Dish Workers Union entered into a working agreement with The Wallace Corporation concerning wages, hours of labor and conditions of employment, which said contract is now in full force and effect; that pursuant to authority conferred by the said National Labor Relations Act a union shop provision was included in said working agreement; that the persons named in Paragraph 11 of the complaint aforesaid and alleged to have been discharged by The Wallace Corporation because they were members of the United and because they were not members of the Independent, were, in fact, discharged by virtue of said union shop provision as a result of their not being members of the said Richwood Clothespin and Dish Workers Union; that one of the provisions of the agreement whereby the said election was held related to a union shop provision and that the said Local Union No. 129 refused to agree to such consent election unless it was stipuated that in the event that the said Local Union No. 129 should be chosen as the exclusive bargaining agency for said employees, that a union shop provision would be inserted in the working agreement requiring all employees of the said Wallace Corporation to be members in good standing of said Local No. 129; that having withdrawn the original unfair labor practice charges and having admitted the legality of the Richwood Clothespin and Dish Workers Union as a labor union and having insisted upon a union shop provision prior to the election aforesaid, the said Local No. 129 and the National Labor Relations Board are now estopped from questioning the validity of said election, the validity of the

Richwood Clothespin and Dish Workers Union or the contract made by it with The Wallace Corporation pursuant to its selection as the bargaining agency by the Wallace Corporation employees in the election aforesaid."

B. *Decision and Order of the Board.*

February 27, 1943, the Board issued its Decision and Order which on May 1, 1943, it vacated and set aside and directed reargument. That order was signed only by Harry A. Millis, Chairman of the Board, while Member Gerard D. Reilly concurred in the Decision and Order but employed reasoning different from that of Chairman Millis. Employer, Union and Independent participated in the reargument, and under date of June 7, 1943, the Board again issued its Decision and Order wherein, among other things, it found that the employer had dominated and interfered with the formation and administration of, and contributed support to, the Independent; that said contract between it and the employer dated March 7, 1942, "falls outside the proviso to Section 8 (3) of the Act" and ordered reinstatement of the forty-three employees to their former or substantially equivalent positions and ordered disestablishment of Independent as a representative of any of the employees of said employer for enumerated collective bargaining purposes.

2. DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

The decision and decree[a] of the Circuit Court of Appeals for the Fourth Circuit entered on February 3, 1944, enforced

[a] The decision and decree were entered in two proceedings for review: (1) Case No. 5135, upon petition for The Wallace Corporation. (2) Case No. 5163, upon petition of Independent. See Record, pp. 352, 371, 345.

the order of the Board and directed that Independent abide by and perform the Board's directions contained in said order. A rehearing (R. 372, 374), timely filed in said Court, was denied on March 13, 1944.

The Circuit Court of Appeals, in its opinion (R. 345), inter alia, invalidated the agreement of March 7, 1942, between employer and Independent, and justified its ruling on the factor that employer had knowledge of Independent's intention to deny membership in Independent "when it (employer) knew that they were denied membership because of prior union activities." The opinion of the Court likewise declares the discharge of employees, pursuant to the contract, was an unfair labor practice and justifies the Board in going fully into the question of company domination, notwithstanding the agreements of January 13 and January 19, the election conducted by the Board, and its certification of Independent as the exclusive collective bargaining agency. It likewise, summarily and without analysis of the evidence in its opinion, justifies the Board's factual conclusion of employer sponsorship and domination of Independent as an organization.

3. STATEMENT OF FACTS

(1.) RELATING TO THE CONTRACT OF MARCH 7, 1942.

In September, 1941, following an organizational campaign by the Union among the employees of employer at its Richwood, West Virginia, plant, the Union called a strike. Demand for recognition as the exclusive collective bargaining agency was made upon employer, whose President, Mahlon B. Wallace, Jr., was offered three methods of de-

termining whether the Union had a majority, namely: an election conducted by the Board; a card count; and determination by three ministers of the employees' choice. Wallace chose the Board election. The Union then refused. (R. 270, 271). The strike followed.

In October, 1941, a group of employees organized Independent. (R. 89). The history of the organization of Independent is not a part of the record except insofar as the Board, by the grossest type of hearsay testimony, has attempted to show that it is company sponsored and dominated. The Board's evidence on the issue of company sponsorship, aid and domination of Independent are detailed under heading "2. Relating to Issue of, Employer Sponsorship, Domination of, and Aid to, Independent." It suffices at this point to state that on October 14, 1941, the Independent requested employer recognition as collective bargaining agency for the employees, but meanwhile the Union had filed charges of unfair labor practices against the employer. Independent's request was not granted and by petition then filed with the Board, it sought certification as the bargaining agency pursuant to Section 9 (c) of the Act. (R. 292).

On November 3, 1941, Wallace and William T. Christmas, employer's Vice-President and Treasurer, met with a representative (Russell R. Miller) of the Board in Richwood, together with employer's foremen and representatives of the Union. Independent representatives had not been invited, and, in fact, Miller specifically refused to have them called in for interview. (R. 272, 248). According to Christmas' testimony, which is not contradicted, Miller stated that from information given him in Charleston by Union people and "some of our employees", he (Miller) had concluded that Independent was company dominated (R. 918), and pro-

posed a Board election (to which the Union had agreed) on condition that Independent would have to be "out of the picture". (R. 248).

The strike continued until January 13, 1942, when the plant reopened. On the preceding day, Wallace and Christmas had come to Richwood for the purpose, as explained by Christmas, that "the plant had been closed for about fifteen weeks, and it was a question of just what we had to do something, we were about to lose all of our customers." (R. 261). They met with the Richwood Federation (Chamber of Commerce). (R. 272). Wallace stated that "after talking to the Independent group, who apparently wanted to work, and to the townspeople, I decided to open up." (R. 273). All employees were invited to return. (R. 252, 260). Thereafter a meeting took place between Independent and Union at which the latter claimed that Wallace had agreed with it to have a yes or no vote on selection of Union. A delegation of Independent, including Carm Reese and Lundy Groves, called upon Wallace to determine the verity of that statement. Wallace denied having made it. (R. 274).

On January 13, 1942, the employer and the two labor organizations executed an agreement (R. 54), wherein it was agreed that work should be resumed pending an election by the Board to determine which, if either, of the unions represented a majority, and was entitled to certification as the collective bargaining agency and that "the company further agrees that if either union is proven to represent a majority of its employees by said vote, it will recognize a Union Shop, providing that the Company shall at all times retain the right to suspend, hire or discharge any employee for proper and just cause." Union representatives contended for a closed shop. (R. 276).

On January 19 following, the two unions and the employer entered into another agreement, which provided for a consent election to be held under the supervision of the Board on January 30, 1942. (R. 56). Another agreement between employer and Union provided for the settlement and withdrawal by Union of charges it had theretofore filed with the Board charging company sponsorship and domination of Independent. (R. 53). The case involving such charges was closed and the agreements entered into were approved by the Board's Regional Director, Phillip G. Phillips. (R. 51, 59). The election held by the Board as scheduled, resulted in the selection of the Independent by a majority of the employees. (R. 18, n. 31). No objection being made to the conduct of the election, Independent was certified by the Board to have been selected as the exclusive collective bargaining agency of employer's employees at the Richwood plant. (R. 18).

Shortly thereafter the employer and Independent entered into negotiations for a working agreement. B. E. Thompson, business agent for Independent, under date of February 28, 1942 (R. 287), directed a letter to Christmas in which he insisted that Independent must have a closed shop. The letter read, in part, as follows:

> "The closed shop will, therefore, give us some control in preventing the hiring of additional employees who are unfavorable to our interests and who would further jeopardize our majority. It would also provide us with a legal means of disposing of any present employees, including Harvey Dodrill, whom our members have declared by *unanamous* ballots that they will not work with, whose presence in the plant is unfavorable to our interests because those who are so unfavorable will not be permitted to become members of our organization and without such member-

ship they would not be permitted to work in the plant under a closed shop contract which we respectfully insist we MUST have."

The first draft of the agreement contained a closed shop clause which the employer opposed, as it did other provisions therein (R. 263, 277). Thompson testified that he insisted upon a closed shop "but eventually modified it to a union shop". (R. 110). Thompson had harsh words with both Davis, employer's General Manager at the Richwood plant, and Wallace about it. (R. 112). According to Wallace, he wanted to "have it kicked out altogether." (R. 277).

On March 7, 1942, the employer and Independent agreed upon a contract containing, not a closed shop clause, but one by which it was provided that all present and future employees eligible for membership "shall become members" of Independent within ten days from the date of contract or date of hiring, as the case may be. (R. 61). The posting of the contract in employer's plant was effected on March 7. On March 16, employer posted a notice that pursuant to said contract, only members in good standing in Independent could continue to be employed on and after March 18, 1942. Thirty-one employees sought but were denied Independent membership and were laid off. Twelve others, none of whom applied for membership, were likewise laid off. As to the thirty-one denied membership, the record shows that "their applications were voted upon by members of said organization in the regular manner as provided by the constitution and by-laws of said organization but said applications did not receive the required number of votes to permit them to become members therein." (R. 98, 103). Efforts of the employer to have Independent take the steps necessary to put back to work those employees so laid off were unavailing and the Board then issued its complaint, which is the basis of this proceeding.

(2) FACTS RELATING TO ISSUE OF EMPLOYER'S SPONSORSHIP AND DOMINATION OF, AND AID TO INDEPENDENT.

On the night of October 2, 1941, a group of employees met at the home of Lundy Groves for the purpose of organizing an employees' association. The Board found that on the appointed night Clark Gibson, a foreman at employer's plant, met a group of employees on the street and adjourned a meeting which was to be held at his home to that of Lundy Groves, explaining that he could not have it at his house "There is too many C. I. O. members". This finding of the Board is based upon the testimony of Mrs. Mable Hinkle, who though not present at the meeting testified that Mrs. Lundy Groves, on the morning of October 3, in a conversation with her, had related that the meeting was to be held at Clark Gibson's home. In another portion of Mrs. Hinkle's testimony she quotes Mrs. Groves' statement that "Gibson's house was filled up." (R. 93). Mrs. Hinkle likewise quoted Mrs. Groves as saying that she called Irene Weese who in turn recommended B. E. Thompson, a local newspaper editor, who had had previous experience with labor unions. Board's witness, Mrs. Pearl Stewart, testified that she and some other girls saw Clark Gibson talking to Independent members on the street, and that the girls turned and went to the home of Mrs. Groves. Upon questioning by the Trial Examiner, "Could you overhear anything that was said between them and this Gibson?"; Mrs. Stewart responded, "No I did not." (R. 136).

B. E. Thompson admits that he went to the home of Mrs. Lundy Groves, but denies that he had had any communication from Irene Weese with reference to the meeting of the

employees at the Groves' home, or that she made any suggestion to him that he attend the meeting. He stated (R. 116) he attended the meeting in response to a call from Mrs. Lundy Groves. According to the record, Thompson, prior to his affiliation with the Independent as business agent, was editor of a newspaper in Richwood, and as such had written and published a series of editorials denouncing the activities of the Union, which he described as "radical." Thompson, as the record shows, had had previous experience with labor unions. He had helped organize an international union at Richards City, Tennessee, which resulted in collective bargaining and material improvement of the condition of the employees. He had likewise been a member of the Brotherhood of Electrical Workers, and was associated with another independent union in Richwood. (R. 104). Thompson disassociated himself from Independent on May 15, 1942, after a representative of the Board advised Thompson's employer that the Board was going to prefer unfair labor practices and company union domination charges against Thompson's employer, and suggested to that employer that he not only have Thompson disassociate himself from Independent but from Richwood as well, and that as a condition to withholding the complaint against the employer, Thompson had to be either discharged or transferred to some other location (R. 105-109).

At the organizational meeting Carm Reese was selected as President, E. G. Robinson, Vice President, Madge Dotson, Secretary-Treasurer, and Carm Reese, Lundy Groves, George Tyree, Zeka Smith and another were selected as the Board of Directors. The Board found that Carm Reese, Lundy Groves and Ancil Smith "were identified with management and that their conduct in connection with the formation and administration of the Independent is attributable to the" employer.

(R. 11, No. 17). A discussion of their duties as employees appears in that part of the Argument herein which challenges the findings of the Board that employer sponsored, dominated and interfered with the formation and administration of Independent and contributed support to it, and the Circuit Court of Appeals' approval of such finding.

ASSIGNMENT OF ERRORS.

The following assignment is limited in scope to those which directly affect Independent:

(1) The Circuit Court of Appeals erred in invalidating the contract of March 7, 1942, and in holding that Independent was not entitled to invoke the closed shop proviso of Section 8(3) of the Act and in holding that discharge of the employees, pursuant to said contract, was an unfair labor practice.

(2) The Circuit Court of Appeals erred in its holding that the Board was justified in finding that execution of the contract of March 7, 1942, with Independent was an unfair labor practice and, either upon or without such finding, was justified in considering in connection therewith alleged unfair labor practices which had antedated the election agreement and election.

(3) The Circuit Court of Appeals erred in its conclusion that the evidence sustains the Board's findings of company sponsorship and domination of, and aid to, Independent.

(4) Said Court erred in its decree that the Board's order be enforced.

ARGUMENT

I.

THERE IS NO FACTUAL OR LEGAL BASIS FOR THE COURT'S CONCLUSION THAT THE DISCHARGE OF EMPLOYEES WAS DISCRIMINATORY AND CONSTITUTED AN UNFAIR LABOR PRACTICE WITHIN THE MEANING OF THE ACT:

(a) The alleged discharges were made pursuant to a union shop contract, permissive under the proviso of Section 8(3) of the Act.

(b) The union shop provision, embodied in the contract, was agreed upon by the two competing unions and the employer and was approved by the Board.

(c) Knowledge of Independent's intention to exclude employees from its membership came after the agreement of the parties and approval of the Board.

(d) Independent had a legal right to exclude the employees from membership; such exclusion is not in violation of the Act.

At the outset, it is important to observe that there is no contention on the part of the Board that there was any conspiracy between the employer and the independent union to bring about the discharge of any of the employees denied membership in Independent. The Circuit Court of Appeals [141 F. (2d) 87, 91] itself says: "It would not be fair to the company to say that it conspired with the independent union to bring about a discharge of troublesome members of the opposite union." It is clear that the basis of the Court's

conclusion that the discharges constituted an unfair labor practice is because the company entered into the agreement of March 7, 1942, knowing that Independent intended to deny membership to some of the employees because of prior union activity. The statement by the Court that discharge of the employees was because of prior union activity is, of course, a conclusion only. The record shows that the thirty-one employees who applied for membership did not receive the required number of votes required by Independent's By-Laws and that discharge followed their failure to acquire the status of membership. Both the Circuit Court of Appeals and the Board (R. 21), predicated their conclusions on the factor of knowledge of what Independent intended to do; but it is asserted that each of these tribunals failed to give legal significance to the fact that this knowledge did not come to the employer until after it had entered into a binding pact for a union-shop provision. It must be remembered that the tripartite agreement wherein the employer consented to recognize a union shop in the event that either union represented a majority of its employees, was entered into on January 13 and it was not until February 28 that Thompson wrote the letter to employer demanding the closed shop. Not to be overlooked, also, is the fact *that the provision for union shop was without condition or limitation*, yet the Circuit Court of Appeals (supra, p. 91), opines that the employer "should have seen that provisions were inserted in the contract that would have protected their [minority] rights." Now, the Circuit Court of Appeals in another portion of its opinion (supra, p. 90), recites that there can be no judicial control of union membership, yet it places upon the employer the burden of inserting into the contract a condition, the effect of which is the control of such membership. In other words, what power the judicial process lacks, the employer, according to the

Circuit Court of Appeals, must insist upon—and insist upon, despite the fact that such a provision is in contravention of what the contracting parties theretofore determined to be their agreement. Would this not be an interference by an employer with the administration of a labor organization, which is prohibited by Section 8(2)? It is anomalous that a judicial tribunal would require that a contract be broken rather than to insist upon the parties thereto adhering to its terms when such terms are valid; yet such is the practical effect reached under the opinion of the Circuit Court of Appeals. Certainly no one would contend that the Union, as a party to the tripartite agreement of January 13, did not have a full understanding of the term "union shop" and the incidents thereof.

The pertinent portion of Section 8(3) of the Act reads as follows:

> "It shall be an unfair labor practice for an employer * * *
>
> "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act * * * shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective bargaining unit covered by such agreement when made". 49 Stat. 452, USCA, Tit. 29, Sec. 158.

From statements of Senator Wagner, both upon introduction of the Act and thereafter, it is clear that his bill "merely preserves the status quo" except as the limitations expressly appear therein.* "Inclusio unius est exclusio alterius." When it is remembered that the Board had certified Independent after permitting withdrawal of the first charges and then allowing its name to be placed upon the election ballot, it may not be gainsaid that, under the Board's own recognition and conduct, Independent fulfilled the legal characteristics of a union with which a closed-shop agreement could be made under said proviso.

Prior to passage of the Act, the right of labor unions to determine the constituency of their membership had judicial approval. *Simpson* v. *Grand Inter. Bro. of Locomotive Engrs.* 83 W. Va. 355, 98 S. E. 580; *Mayer* v. *Journeymen Stonecutters' Assn.*, 47 N. J. Equity 519, 20 A. 492; *Murphy* v. *Higgins*, 12 N. Y. Supplement (2d) 913; *Miller* v. *Reuhl*, 2 N. Y. Supplement (2d) 394 (1938); *Greenwood* v. *Building Trades Council*, 1 Calif. Appeal) 159, 233 Pac. 823; 1 Teller, Labor Disputes and Collective Bargaining, 287 et seq., wherein the following appears:

> "There appears to be no legal theory in the absence of contractual provision to the contrary, whereby an employer can question the expulsion of a competent employee in consequence of which the employer is

* "Equally erroneous is the belief that the bill creates a closed shop for all industry. * * * Far from suggesting a change, *it merely preserves the status quo.*" (Italics supplied). Congressional Record, Vol. 79, pt. 3, p. 2372, 74th Cong., 1st Session. "The virulent propaganda to the effect that this bill encourages the closed shop is outrageous, in view of the fact that *in two respects it actually narrows the now existing law.* * * * In the first place, while today an employer may sign a closed-shop contract even with a minority group, the bill provides that he shall be allowed to negotiate such an agreement only with an organization which represents the majority. * * * Secondly, the bill is extremely careful to forestall the misuse of closed shop agreements with unions that are dominated by, or dominate, the company." Idem, p. 7570.

> obliged under the agreement to discharge him. This may in a given instance cause great harm to a business or production of an employer especially in a case where the expelled employee is a skilled workman whose skill is the result of long training in the employer's plant."

See also *Shein* v. *Rose*, 12 N. Y. S. (2) 87 (1939), wherein it is said that "Membership is a privilege and not a right."

In *Miller* v. *Reuhl*, 2 N. Y. S. (2d) 394 (1938), a rejected applicant for membership in a union sought by a court proceeding to compel the union to accept him for membership. The court denied the request, and because of its sound reasoning and expression of policy, we quote therefrom as follows:

> "Before these recent efforts to unionize industry had governmental sanction in the manner in which such sanction is expressed today, there had been efforts made on the part of individuals to force themselves into membership of unions and the courts have held in such cases that a union could not be compelled to accept an application for membership unless the union so desired. *The basis of such holding has been that, if the union which was a voluntary association organized for the good of those taken into membership and for those in industry who would be eligible to membership could be compelled to accept members, the persons whose interests were inimical to the union and its purposes could force themselves into membership in the union and, from within, destroy the union and thus stultify the purposes for which the union was organized.* * * *" (Italics supplied).

In some states where labor relations statutes have been enacted, the hitherto unqualified and unlimited autonomy of a

labor union has been encroached upon,[5] and by such statutory enactments provision is made against discriminatory rules of admission to membership in unions. The passage of such legislation indicates the necessity of legislative control—not judicial—if such autonomy is to be limited. This was expressly stated in *Miller* v. *Reuhl*, supra, wherein the New York court aptly stated:

> "As the Legislature had not enacted a specific statute compelling unions to accept members, this court is of the opinion that a labor union which is a voluntary association still has the right to reject applicants for membership at will. In view of this holding, one might ask what is to become of the applicant if he is true in his statement of fact that he will be unable to obtain employment at his chosen vocation because he is not a member of the union. This is a question involving public policy and must be answered by the Legislature. *In enacting legislation to strengthen the cause of labor through unions, the Legislature has not made provision to compel unions to accept members. Its failure to do so must be accepted as the present expression of public policy and therefore an indorsement of the view expressed in the cases above cited that an applicant for membership cannot force his way into the union against the negative vote of the union.*" (Italics supplied)

---

[5](a) Pa. Stat. Ann. (Purdon, tit. 43, § 211.6 (1) (c): "* * * if such labor organization does not deny membership in its organization to a person or persons who are employers of the employer at the time of the making of such agreement * * *"

(b) Laws of Wisconsin (1939) Ch. 57: "The Board shall declare any such collective agreement terminated whenever it finds that the labor organization involved has unreasonably refused to receive as a member any employee of such employer * * *."

(c) Laws of Kansas, (1941), Ch. 265: "No labor organization * * * shall be the representative unit for the purpose of collective bargaining * * * which in any manner discriminates against, or bars, or excludes from its membership any person because of his race or color * * *."

In *N. L. R. B. v. Electric Vacuum Co., Inc.*, 315 U. S. 685, 62 S. Ct. 816 (1942) it was said that the proviso expresses "The precise nature and limits of permissible employer activity in union organization." The duty imposed by the Circuit Court of Appeals in the instant case certainly goes beyond that permissible employer activity.

The Circuit Court of Appeals defines a union-shop contract to mean "that the employees of the company would be required to become members of the successful union as a condition of retaining their employment, not that the successful union might have discharged from employment those who had been on the opposite side of the dispute even though they were willing to become members, by the simple device of denying them membership." It is submitted that the negative portion of that definition is contrary to the principle which permits a union to determine the constituency of its membership. Of course, membership is a *must* if a workman is to retain his employment[2]; but if an employer, as prerequisite to its agreeing to a closed or union shop agreement may require the union holding the agreement to waive its right of member selection, it may well be questioned whether, in time, the employer would not be in control of the union itself. In the instant case, there is nothing in the record which justifies any definition of the "union shop" than that which is generally accorded it. There is nothing upon which even an inference may be established that either union signatory to the settlement agreement intended that there should be a waiver of its right to determine who should be admitted to membership. How could there have been any aid to Independent by reason of the employer's signing the contract of March 7,

[2] "Under the 'union shop' non-members may be employed, but to retain employment must become union members after a certain period." How Collective Bargaining Works (Twentieth Century Fund) p. 21, Note 11.

1942: *The obligation of the employer to provide a union shop was already fixed* and the right of Independent to exclude existed. Clearly distinguishable is the case at bar from the *Electric Vacuum Co.* case, supra. The issue of which was an employers right to assist a union representing an uncoerced majority to secure new members, prior to a closed shop agreement. In the case at bar, the reasoning of the Circuit Court of Appeals, it is respectfully submitted, reaches a point of confusion when it employs as a basis for holding the employer guilty of an unfair labor practice, that the Act was never intended to authorize a majority to discriminate against a minority, for the Act deals with employer discrimination—not with union discrimination.

If, as shown above, the adoption of the Act into law permitted an employer to enter into a union shop agreement within the limitations expressly stated in the proviso of Section 8(3), all of the incidents of the union shop necessarily attended. Membership selection is one of its incidents. Therefore, in construing the rights of an individual or of a minority group under the Act, it is clear that whatever those rights may be, they are subject to the incidents of the union shop itself.

The matter of public policy, which the New York court in *Miller* v. *Rendl*, supra, considered so pertinent, the omission of limitation upon membership selection in the proviso in Section 8(3) and the inclusion thereof in state statutes as well as the effect of the tripartite agreement itself, are phases which the Circuit Court of Appeals did not discuss, and which we submit are vital in a determination of this issue.

The Board cited as authority for the result reached by it in the instant proceeding the cases of *Matter of M. Henri*

Wines, Ltd., 44 N. L. R. B. 1310 and *Matter of Rutland Court Owners, Inc.*, 44 N. L. R. B. 587, and the Circuit Court of Appeals approved thereof. It is submitted that these cases are not parallel to that of the one under consideration and therefore not controlling. In each of the cited cases there was lacking the obligation of the employer to enter into a contract calling for a provision under which applicants could be rejected. There was lacking also an agreement to which the complaining union had lent its signature and the Board its approval. Moreover, the facts in the two cases are so dissimilar to the one involved here as to make them inapplicable. The gist of the issue before the Board in the *Rutland Court Owners* case was the right of employees to change representatives and did not involve the right of a union to reject an applicant for membership. In the *M. Henri Wines, Ltd.* case the union first used the employees' designation of it as a bargaining agent to obtain a closed-shop agreement and then denied the employees membership in the union. The Board condemned the union's actions as a fraud upon the employees.

It is difficult to perceive how the rights of Independent may be affected under a charge that the employer discriminated in discharging the employees in a record which does not show any discriminatory purpose or any evidence that the employer knew that those whom it laid off had been Union members.

II

THE CIRCUIT COURT ERRED IN HOLDING THAT THE BOARD WAS JUSTIFIED IN CONSIDERING ALLEGED UNFAIR LABOR PRACTICES WHICH ANTEDATED THE ELECTION AGREEMENT AND THE ELECTION.

It is not clear from the opinion of the Circuit Court of Ap-

peals what its basis is for permitting the Board to inquire fully into the history of Independent to determine whether it was a proper agency within the meaning of the Act. In one portion it declares that "even if charges such as those were involved but not considered of themselves unfair labor practices within the meaning of the act, we think that the Board was justified under the circumstances * * * in going fully into the question of company domination and holding the Independent to be a company dominated union and hence not entitled to invoke the closed shop provision," while in another portion of the opinion the Board's power so to do is limited "in the light of subsequent developments." The latter quoted portion is as far as the Board itself has gone. In a number of cases which involve consent election agreements and approval by Board's representatives, the Board has evidenced its desire to uphold such agreements and its decisions have reflected a pattern of policy. In *Simplicity Pattern Company, Inc.*, a corporation, and *Local No. 92 International Union U. A. W. of A.*, 16 N. L. R. B. 291, a somewhat analagous situation to that involved in the instant case was considered. Therein, as here, charges had been made to the effect that the employer had discriminated against the C. I. O., and had dominated and interfered with the formation and administration of an Independent, had contributed support to it. As here, a settlement agreement had been entered into, and it was claimed that the employer had not complied with the terms of such settlement agreement. The Board, however, held as follows:

> "We are of the opinion that the respondent has substantially complied with its agreement of April 27 with the U. A. W. A. It is apparent from the record that both parties were in doubt as to the probable outcome of the charges, or some of them, if they should proceed to a hearing. The proposed settle-

ment, suggested by the Regional Director, was not patently unfair or unjust, and a compromise of such matters on terms such as those agreed upon should not be discouraged. As we have heretofore stated in other cases, the Board is not precluded by a settlement or compromise of unfair labor practice charges from proceeding with a determination of such charges, even though the Regional Director or other agent of the Board, as here, may have participated in and sanctioned the compromise agreement. Nevertheless, *effective administration of the Act requires that the Board recognize and respect matters of adjustment in which its agents have participated.* We believe that in the case before us the policies of the Act will best be effectuated by giving effect to the compromise agreement made between the respondent and the U. A. W. A. and by refraining from a consideration of matters set forth in the charges filed by the U. A. W. A. on April 26. We shall therefore dismiss the complaint in so far as it relates to matters covered by those charges."

Board Member Leiserson would have gone even farther, and would have held, in view of the consent election agreement, the election and the notice of neutrality which employer posted at the request of the Board's agents, that the complaint be dismissed in its entirety. See also *Chambers Corporation and Allied Stove Mounters and Stove Processors, Union Local* 5 LRR Man 132; *Matter of Wickwire Bros.*, 16 N. L. R. B. 316; *Matter of Hope Webbing Company*, 14 N. L. R. B. 55.

The statement of the Court, that even if the discharges were not of themselves unfair labor practices within the meaning of the Act, goes far beyond the policy or contention of the

Board itself; and, in fact, is in contravention of a decision of the Circuit Court of Appeals.

In *Hazel-Atlas Glass Company* v. *NLRB*, 127 F. (2d) 109 (1942) CCA 4, the Court gave full faith to a settlement agreement and held that violations of the Act which were the subject of the settlement agreement, had little significance because of the agreement which had Board approval. No reference was made by the Circuit Court of Appeals in the opinion in the case under appraisal of the *Hazel-Atlas Glass Co.* case. In *NLRB* v. *Appalachian Electric Power Company*, 140 F. (2d) 217 (1944), recognition of Board certification was required of an employer to avoid "litigious bedlam and judicial chaos." We submit that the Board should be held to its own certification for the same reasons.

In the instant case parties to the settlement agreements in executing them, and the Board in approving them, unquestionably regarded their execution as the settlement of the controversial issues over which there had been disagreement for some time. One of such issues was the charge, made by Union, that the employer had sponsored the Independent. In such charge a Board agent lent encouragement. The effect of the Circuit Court's approval of the Board's review of the issues thus settled is to say that one party to an agreement is bound by the contract only if it is successful in obtaining a majority vote. Unless significance is attached to the execution of the settlement agreements, a signed contract between an employer and competing labor unions, is rendered meaningless and would justify contracting parties to assume an attitude of irresponsibility toward their solemn written words. The Circuit Court stresses the point that the Board is required to perform its duty. That requirement is, of course, appealing, but since the Board was fully informed, it should not now

be permitted to assume a position inconsistent with its approval and conduct, particularly where others have acted in reliance thereof. Agreements between an employer and opposing unions have become an integral part of the Board's procedure for determining bargaining representatives.[7] Litigants before the Board should not be placed in a position where they cannot feel with security that there is finality to their agreements. When it is recalled that certification by the Board followed an expression of choice on the part of the employees involved, the language in *NLRB* v. *Sun Shipping and Drydock Company*, 135 F. (2d) 15, CCA 3, is peculiarly appropos in the instant proceeding:

> "* * * After all, the fundamental purpose of the Act is to secure to employees entitled to its protection the right to bargain collectively through representatives of their own choosing. Obviously, therefore, once a majority choice has been competently polled and authoritatively certified, it is not to be avoided lightly. Otherwise the employees' right may actually be infringed and the purpose of the Act thereby thwarted."

III

THE CIRCUIT COURT OF APPEALS ERRED IN SUSTAINING THE BOARD'S FINDINGS THAT THE EMPLOYER DOMINATED AND INTERFERED WITH THE FORMATION AND ADMINISTRATION OF INDEPENDENT AND HAS CONTRIBUTED SUPPORT TO IT.

The Circuit Court of Appeals, without detail of the evidence relating to the Board's contention that the employer had sponsored, dominated and interfered with the formation and administration of Independent, summarily approves the

[7] Eighth Annual Report NLRB, 52.

Board's findings. The position of Independent, as in the court below, is that the Board's findings are not based upon substantial evidence but are contrary, not only to the evidence, but to well-established legal principles.

An analysis of the Board's decision discloses that, in order to conclude that the employer had dominated and interfered with the formation and administration of Independent, the Board employed four findings which we shall discuss *seriatim* and each of which it is contended is erroneous:

> (1) *That Clark Gibson, a foreman at employer's plant associated himself with a group of employees who participated in formation of Independent.*

It is submitted that there is no competent legal testimony to support such a conclusion. The testimony of Board's witness, Mrs. Pearl Stewart, typifies the basis employed by the Board to reach its conclusion and to assert its factual finding. She testifies that she and some other girls saw Gibson talking to Independent members on the street and that the girls turned and went to the home of Mrs. Groves where, admittedly, the first meeting was held; but when the Trial Examiner propounded to her the next question, "Could you overhear anything that was said between them and this Gibson? she responded, "No, I did not." Yet the Board states in its Decision (R. 136) that "* * * that night Gibson met the employees on a street corner and adjourned the meeting to the home of Mrs. Lundy Groves, who lived in a more secluded section of Richwood, because Clark Gibson's house was 'filled up' and 'there [were] too many C. I. O. members [about].'" It is to be noted that the Board fills in what it desires that the witness should say by adding the words in the quoted portion in brackets. The latter part of the quoted por-

tion is based upon the testimony of another Board witness, Mrs. Mabel Hinkle, who testified that Mrs. Groves, after the Independent meeting had been held, said that such meeting was to be held at Clark Gibson's but that his house was filled and the meeting had to be held at Mrs. Groves'. Mrs. Hinkle herself had not been at the meeting, had not heard Clark Gibson make any statement concerning the meeting, and simply attempted to mouthpiece Mrs. Groves purported statement to her. This evidence is purely hearsay and may not be used as a basis for showing that Gibson associated himself with a group of employees who participated in formation of Independent.

The test of sufficiency of testimony necessary to uphold a finding of the Board is worded thus in *Consolidated Edison Co.* v. *N. L. R. B.*, 305 U. S. 197, 83 L. ed. 126, 140:

> "We agree that the statute, in providing that the findings of the Board as to the facts, if supported by evidence, shall be conclusive, means supported by substantial evidence. * * * Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

The testimony of Mrs. Stewart and Mrs. Hinkle does not meet that test, and there being no testimony on the issue which does, the conclusion of the Board of Gibson's participation in the formation of Independent does not have legal basis.

(2) *That B. E. Thompson, who became Independent's business agent, attended Independent's first meeting as a result of the recommendation of Weese, whom the Board identifies with management.*

As the record shows, Thompson, editor of the Nicholas

Republican and a person of considerable experience in labor organizations, attended the first meeting of the Independent, at Mrs. Groves' home. Weese, secretary to Plant Manager Davis, admits a telephone call from Mrs. Groves the night of the meeting about some assistance in organization of the employees' group. She testified (R. 232) that she did not recall mentioning Thompson's name but referred Mrs. Groves to The Greater Richwood Federation, an organization of businessmen. Thompson testified that he had had no communication from Weese with reference to any meeting and he stated positively upon inquiry from the Trial Examiner that Weese made no suggestion to him that he attend it. Yet the Board finds that "Weese recommended Thompson to Mrs. Lundy Groves and that she invited Thompson to attend the meeting as a result of Weese's recommendation." (R. 11)

That there is no legal significance which may attach to the fact that Mrs. Groves called Weese for advice is clear from the testimony that it was not an unusual occurrence for the employees to consult her about their personal affairs every day, one witness stating that they consulted her about "everything from new babies, hospitalization, operations," selective service and other matters. (R. 217, 218). Moreover, as the record shows, Thompson was business agent for another independent employees' labor organization in the town of Richwood (R. 104), and it is a reasonable presumption that that fact was the basis for Mrs. Groves' call to Thompson and his resultant attendance at the meeting.

Further, it is submitted that the Board was in error in identifying Weese with management. She has no authority to give orders other than as directed by Manager Davis. (R. 217). In *Cupples Co. Mfgrs. v. Board*, 106 F. (2d) 100 (CCA 8), in speaking of a "forelady" or "supervisor" who had

openly urged employees to join an independent union and advised them that if they did not join, they might lose their jobs, and whose duties consisted of transmitting orders from her superiors to employees under her, and who had authority to recommend employment or discharge, but had no power to hire or fire, the Court stated:

> "It seems to us that the question of her title is unimportant, and that the vital question is whether, under the evidence, she was or could reasonably be found to be the representative of the Company in connection with her activities relating to the two labor unions."

In *N. L. R. B.* v. *Poultrymen's Service Corporation*, 138 F. (2) 204 (CCA 3), the Board had included within the appropriate unit three employees who had access to confidential company information but not with respect to labor relations. The Court stated that, "Possession of confidential information is of itself insufficient to justify deprivation of the right to collective bargaining."

(3) *That "The Independent lent itself to the respondent as an aid in the back-to-work movement in opposition to the Union."*

The Union called a strike on September 25. The employees' organization came into existence in October. For approximately four months the employees were out of employment. It is true that there is testimony of the Company's supervisory force attempting to get its employees back to work, and that Griffie, a Union member, quoted Groves, an Independent member, who solicited Griffie's membership in Independent, as saying "that was the only way we was ever a-going to get back to work up there, if we ever got this thing settled we would have to settle it in that way." Of course,

Groves was interested in two things: (1) getting back to work himself and (2) getting additional members for his labor organization. Certainly condemnation of those motives is not warranted. The Board's opinion records, also that Wallace decided to resume plant operations after talking with Richwood inhabitants and Independent adherents who desired to return to work. The right to return to work is the subject of comment in *Polish Nat. Alliance Etc.* v. *N. L. R. Bd.* 136 F. (2d) 175, 181 (CCA 7). It reads:

> "In our view, this order as to Ziolkowski is clearly erroneous. Certainly, he as an individual, the same as any other employee, had a right to strike or not to strike as he saw fit. After having joined the strikers, he had an equal right to continue on strike with the others or to return to work as he saw fit. He chose the latter course, and as the Board found, his right to work was discriminatorily denied by petitioner. One member of the Board dissented from the order as to Ziolkowski, stating that he was entitled to be made whole from October 10, 1941, the date when his application to return to work was discriminatorily denied. The soundness of the dissent, in our judgment, is unquestionable, and we take the liberty of quoting therefrom the following statement: *'The policy of the Act would, in my opinion, be best served by encouraging those who have gone out on strike because of their employer's unfair labor practices to return to work and to avail themselves of the administrative remedy which the Act affords them and we should do nothing to deter any individual striker from such action.* The effect of the majority's decision would, it seems to me, be to prolong unfair labor practice strikes and to discourage employees from recourse to the adequate relief available to them under the Act." (Italics supplied)

(4) *That the activities of Carm Reese, Lindy Groves*

and Ancil Smith, all employees, in connection with the formation and administration of Independent, are attributable to employer.

At the outset it is important to note that Carm Reese, Lundy Groves and Ancil Smith, whose activities in connection with the formation of Independent are attributable to employer, were on the list of eligible voters agreed upon in the consent election agreement and while the ballots of the first two were challenged by the Union but eventually the challenges were waived. (R. 190). The facts relating to the employment of these three individuals are as follows:

CARM REESE

According to testimony of Davis, employer's manager, Carm Reese, at the time of the strike was an oiler in the mill room. (R. 205). He was without authority to hire and fire and could not discipline other employees. (R. 206). At the time of the hearing he was a filer. "His job is the circular saws principally; he straightens them; cleans them, puts new cutting teeth in them by grinding them or filing them, automatic filers, automatic grinders, he puts the saw in and takes it out, inspects it." At the time of the strike the sawyer and saw filer, employees also in the mill room, received higher rates of pay than Reese who was paid on an hourly basis. Following the strike, an experienced man was needed in the filing room and, no one other than Reese being available, he was given the job which carried a slight increase in pay over his job as oiler. (R. 207).

LUNDY GROVES

It was the job of Lundy Groves to keep the machines in the clothespin department in operation. His job was termed

a "set up man" and consisted of "grinding and adjusting cutting knives." He was paid on an hourly basis. If a machine became faulty, the girl operating it had the authority to tell Groves to repair it, and he, in turn, could direct her to another machine because "it is to their advantage to keep working." Clark Gibson is the foreman in this department in which there are five set-up men, none of whom have any more authority than another. After the strike Groves held the same position that he had at the time of the strike, and received no pay increase other than general increases. (R. 208-210).

ANCIL SMITH

In the wood dish department, Reed Shaffer and Ancil Smith are the set-up men. They are both paid the same rate on a hourly basis, and neither has any authority. (R. 211-212).

The testimony shows that Reese, Groves and Smith punch time clocks (R. 215). A Union leader, Mike Goheen, was a set-up man in the paper dish department. Except for the foreman, Goheen received the highest hourly rate of pay in his department. His position was the same as that of Groves and Smith, except in a different department. By reason of seniority, Groves "might be regarded as temporary foreman in the absence of the regular foreman." The same basis—seniority—results in others being considered as temporary foremen. Davis testified that Smith had never been used as such. In footnote 17 of the Board's opinion (R. 12) this amazing statement appears:

> "A union leader, Mike Goheen, was also employed as a machine set-up man, but, so far as appears, he did not act as a temporary foreman. *Other employees*

who belonged to the Union acted as temporary foremen but, so far as appears, they were only rank and file union members. (Italics ours.)

Remarkable indeed is the Board's conclusion that Reese, Smith and Groves were identified with management whole no such conclusion is reached as to Union members—temporary foremen—because "they were only rank and file union members."

Citation of *International Assn. of Machinists* v. *N. L. R. B.*, 311 U. S. 72, as authority for the Board's conclusion as to these three men, is unavailing. The test set forth in that case is that the employees "were emulating the example set by management." Such is not the instant case. In *Magnolia Petroleum Co.* v. *N. L. R. B.*, 112 F. (2d) 545 (CCA 5), a sub-foreman had been elected temporary president of the independent union, and his activity was relied upon as one evidential fact to prove company domination and interference. The Court stated::

> "Thus, by its finding, the Board denies to Barton the very right the statute gives him, of action with his fellow-employees for self-organization."

In *N. L. R. B.* v. *Swank Products*, 108 F. (2d) 872 (CCA 3), it was said:

> "Nor do we think that the acts of Stephenson and the other job supervisors in forming and trying to control the policy of the new Association, were tied to the management. They were acting, so far as the evidence shows, spontaneously and for themselves. Because men express dislike to organized labor does not, as the Board suggests in its argument, indicate that they must be acting for the management."

Certainly the record does not justify any conclusion that the three employees discussed under this heading were emulating any example set by management or acting for management, or acting except for themselves and their fellow-employees in pursuance to the right of self-organization accorded them under the Act.

In a proceeding before the Board involving The Cherry River Boom & Lumber Company, 44 N. L. R. B. 273, to which the Board has made reference in its opinion in this case, the Board dealt with the question of whether one Powers was identified with management although just a laborer. Powers was paid by the hour, worked under the supervision of a foreman but sometimes worked with a crew of from one to five men who were assigned to assist Powers. He had no authority to discipline or to hire or discharge them. Several employees testified that he was "boss" and that he told the men what to do and how it should be done. Both Powers and the works manager testified that he was employed only as a laborer. The Board's opinion reads as follows in denying that Powers is identified with management:

> "Although it appears that Powers instructs the other workmen assigned to assist him in repairing the docks, such instruction is not necessarily indicative of his employment in a supervisory capacity. He was the only repairman permanently assigned to and charged with repairing the docks, and his direction of the other workmen is reasonably attributable to this fact and to his consequent familiarity with that particular work. As was true with reference to the conductors and yard graders, we do not believe that the fact that Powers keeps the time of the repair crew is of controlling significance. We are of the opinion that Powers' relationship with the other repairmen on the dock is similar to that of a machinist and his helpers, and we are convinced, therefore, contrary to the

> Trial Examiner, that Powers was neither employed in a supervisory capacity nor accorded ostensible supervisory authority by the respondent. Accordingly, we find that the respondent is not chargeable with the activities of Powers hereinabove set forth."

In the same opinion the Board also finds that yard graders are not a part of management although there was testimony that employees regarded them as "bosses." The Board's language is,

> *"Although several employees who worked as lumber handlers testified that they considered yard graders to be 'bosses' and representatives of the management, the evidence, in our opinion, does not support the finding of the Trial Examiner that they are generally so regarded by the respondent's employees."* (Italics ours)

If, in the instant case, the same rule or test were applied to Reese, Smith and Groves, the error of the Board in identifying them with management is readily apparent.

We submit that the facts relied upon by the Board to stamp Independent as a company-dominated organization do not meet the legal requirements and therefore the findings of the Board in relation thereto do not raise any presumption that such conclusions are warranted. As indicated above, the Circuit Court of Appeals did not weigh the evidence or analyze it in its opinion. Moreover, the Court did not distinguish between the evidence which related to the employer's alleged attitude toward Union or alleged anti-union statements by its supervisory employees and that evidence which related strictly to the organization and administration of the Independent. This distinction, we submit, is important in a

proper appraisal of this case so far as the rights of Independent are concerned.

CONCLUSION

For the reasons indicated, the decision and decree of the Circuit Court, as well as the decision and order of the Board, should be reversed and set aside in so far as they in any way affect the right of, or restrict or prevent Independent from acting pursuant to its certification, or require its disestablishment or require the employer to cease giving effect to the contract of March 7, 1942.

Respectfully submitted,

C. S. RHYNE
730 Jackson Place, N. W.
Washington D. C.

M. E. BOIARSKY
Charleston, West Virginia

Counsel for Richwood
Clothespin & Dish
Workers Union

October 14, 1944.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, c. 372, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment

membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by a majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

* * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.